CHAN YOCK CHER

v.

CHAN TEONG PENG

FEDERAL COURT, PUTRAJAYA
AHMAD FAIRUZ CJ
ABDUL HAMID MOHAMAD FCJ
PAJAN SINGH GILL FCJ
[CIVIL APPEAL NO: 02-03-2004 (J)]
28 JUNE 2005

CIVIL PROCEDURE: *Jurisdiction - Federal Court - Inherent jurisdiction and powers of court - Application under r. 137 Rules of the Federal Court 1995 for judgment to be set aside and for appeal to be reheard - Applicant challenged correctness of judgment on its merits - Principles applicable - Whether application ought to be granted*

By a notice of motion, the applicant, *inter alia*, prayed for the following orders: (i) that leave be granted for Civil Appeal No: 02-03-2004(J) to be re-heard; (ii) that the judgment of this court delivered on 22 October 2004 be set aside; and (iii) that the execution of the said judgment be stayed pending the final disposal of this court in respect of this motion. The respondent had commenced proceedings in the High Court, praying for specific performance of an agreement and, alternatively, for a declaration that the respondent and/or his nominee was the registered and beneficial owner of 32,630 shares in one Son Huut Plantation Sdn Bhd, and that company secretary register the respondent and/or his nominee as the legal and beneficial owner of the said shares. After subsequent appeals and cross-appeals by both parties, this court declared that the respondent was both the beneficial and legal owner of the said shares, and further ordered the company secretary to register the respondent or his nominee as the "beneficial and registrable owner" of the shares. The applicant, in this instance, was asking this court to set aside that judgment and re-hear the applicant's appeal to Federal Court. The applicant, who averred he was making this application pursuant to r. 137 of the Rules of the Federal Court 1995 ('the RFC'), admitted he was challenging the correctness of the judgment on its merits.

Held (dismissing the application)
Per Abdul Hamid Mohamad FCJ delivering the judgment of the court:

[1] This court had the jurisdiction to hear this application and the power to make the necessary orders; this jurisdiction and power was inherent in this court and it was reaffirmed by r. 137 of the RFC. From previous cases, it was clear that, so far, this court had only given orders that its previous decisions, judgments or orders were a nullity or invalid because the court giving such decisions, judgments or orders was not properly constituted. However, in the present application, the applicant questioned the findings of this court, both in law and on the facts. These were matters of opinion, and just because this court might disagree (this court did not say that it agreed or disagreed with such findings) with the earlier panel of this court, that did not warrant this court to review the decision. Similarly, regarding the interpretation and application of some provisions of the Companies Act 1965, even if this court disagreed with the earlier panel (again, this court did not say that it agreed or disagreed), that did not warrant this court to set aside the judgment and the order of the earlier panel of this court, and re-hear and review the appeal. Otherwise, there would be no end to a proceeding. It was the unanimous view of this court that this was not the kind of case which previous judgment and order this court should review. If and when, in another case, the same issue of law arose, then, after hearing a full argument, this court might reconsider and decide whether it agreed with its earlier view or not. This court had done that on a number of occasions before. (pp 45 b, h & 46 a-b)

*[**Bahasa Malaysia** Translation Of Headnotes*

Melalui suatu notis usul, pemohon antara lain memohon untuk mendapatkan perintah-perintah berikut: (i) bahawa kebenaran diberi untuk Rayuan Sivil No: 02-03-2004(J) di dengar semula; (ii) bahawa penghakiman mahkamah ini yang disampaikan pada 22 Oktober 2004 diketepikan; dan (iii) bahawa penghakiman yang sama digantung pelaksanaannya sementara menunggu keputusan mahkamah semasa terhadap usul di sini. Responden telah memulakan prosiding di Mahkamah Tinggi memohon pelaksanaan spesifik suatu perjanjian dan, secara alternatifnya, deklarasi bahawa responden dan/atau nomininya adalah pemilik benefisial dan berdaftar kepada 32,630 saham di dalam Son Huut Plantataion Sdn Bhd, serta supaya setiausaha syarikat mendaftarkan responden dan/atau nomininya sebagai pemilik benefisial dan undang-undang saham-saham tersebut. Berikutnya, selepas beberapa rayuan dan rayuan balas oleh pihak-pihak, mahkamah semasa memutuskan bahawa responden adalah pemilik benefisial dan undang-undang saham-saham tersebut, dan seterusnya memerintahkan

supaya setiausaha syarikat mendaftarkan responden atau nomininya sebagai "pemilik benefisial yang boleh didaftarkan" saham-saham itu. Pemohon memohon supaya mahkamah semasa mengenepikan penghakiman tersebut dan mendengar semula rayuan pemohon ke Mahkamah Persekutuan. Pemohon, yang mengatakan bahawa ia membuat permohonan di sini di bawah k. 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('KMP'), mengakui bahawa ia mencabar kesahihan penghakiman di atas meritnya.

Diputuskan (menolak permohonan)

Oleh Abdul Hamid Mohamad HMP menyampaikan penghakiman mahkamah:

[1] Mahkamah ini mempunyai bidang kuasa untuk mendengar permohonan di sini dan juga kuasa untuk membuat perintah-perintah yang perlu; bidang kuasa dan kuasa ini wujud secara semulajadi pada mahkamah ini dan ianya diperkukuhkan oleh k. 137 KMP. Dari kes-kes terdahulu, adalah jelas bahawa, setakat ini, mahkamah ini hanya membuat perintah bahawa keputusan, penghakiman atau perintah-perintah terdahulunya adalah batal atau tidak sah disebabkan sidang mahkamah yang membuat keputusan, penghakiman atau perintah tersebut tidak ditubuhkan dengan sewajarnya. Sebaliknya, dalam permohonan semasa, pemohon telah mempersoalkan keputusan mahkamah ini atas kedua-dua perkara fakta dan undang-undang. Ini adalah soal pendapat, dan cuma kerana mahkamah ini tidak sependapat (mahkamah ini tidak mengatakan bahawa ia bersetuju ataupun tidak bersetuju dengan keputusan-keputusan tersebut) dengan panel terdahulu mahkamah ini, ianya tidak bermakna bahawa kami boleh mengkaji semula keputusan panel terdahulu itu. Begitu juga dengan soal pentafsiran dan pelaksanaan beberapa peruntukan tertentu Akta Syarikat 1965. Jikapun mahkamah ini tidak bersetuju dengan panel terdahulu (sekali lagi, kami tidak menyatakan kami bersetuju atau tidak bersetuju), itu tidak mewajarkan kami mengenepikan penghakiman dan perintah panel terdahulu tersebut, serta mendengar atau mengkaji semula rayuan. Jika begitulah keadaannya, maka tidak adalah kemuktamadan dalam prosiding. Menjadi keputusan sebulat suara mahkamah ini bahawa kes di sini bukanlah suatu kes di mana penghakiman dan perintah terdahulunya harus dikaji semula oleh mahkamah ini. Jika dan bila, di dalam suatu kes yang lain, isu undang-undang yang sama berbangkit, maka mahkamah ini mungkin akan mempertimbang dan memutuskan sama ada kami bersetuju atau tidak dengan keputusan terdahulu kami, setelah mendengar sepenuhnya hujah-hujah. Mahkamah ini telah beberapa kali berbuat demikian pada masa-masa lalu.*]*

Case(s) referred to:

Adorna Properties Sdn Bhd v. Kobchai Sosothikul [2005] 1 CLJ 565 FC ***(foll)***

Allied Capital Sdn Bhd v. Mohd Latiff Shah Mohd & Another Applicant [2004] 4 CLJ 350 FC ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab-Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Chan Yock Cher v. Chan Teong Peng [2004] 4 CLJ 533 FC ***(refd)***

Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [2001] 4 CLJ 61 FC ***(refd)***

Gan Sin Tuan v. Chew Kian Kor [1958] 24 MLJ 62 ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2004] 4 CLJ 157 FC ***(refd)***

Government of Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 SC ***(refd)***

Hawks v. Mc Arthur & Ors [1951] 1 All ER 22 ***(refd)***

Hunter v. Hunter [1936] AC 222 ***(refd)***

Kesultanan Pahang v. Sathask Realty Sdn Bhd [1998] 2 CLJ 559 FC ***(refd)***

Lee Thye Sang & Anor v. Faber Merlin (M) Sdn Bhd & Ors [1985] 2 CLJ 423; [1985] CLJ (Rep) 196 SC ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(refd)***

MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC ***(refd)***

Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Bhd & Anor [1996] 2 CLJ 586 (FC) ***(refd)***

Phileoallied Bank (Malaysia) Bhd v. Bhupinder Singh Avatar Singh & Anor [2002] 2 CLJ 612 FC ***(refd)***

Puah Bee Hong & Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor & Another Case [1994] 2 CLJ 705 SC ***(refd)***

R Rama Chandran v. The Industrial Court of Malaysia [1997] 1 CLJ 147 FC ***(refd)***

Raja Zainal Abidin Raja Hj Tachik & Ors [1993] 3 CLJ 606 SC ***(refd)***

Scotch Leasing Sdn Bhd v. Chee Pok Choy & Ors [1997] 2 CLJ 58 FC ***(refd)***

Sing Eng (Pte) Ltd v. PIC Property Ltd [1990] 3 MLJ 129 ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***

United Malayan Banking Corporation Bhd v. Palm and Vegetable Oils (M) Sdn Bhd & Ors [1994] 3 CLJ 144 SC ***(refd)***

Wong Sin Chong & Anor v. Bhagwan Singh & Anor [1993] 4 CLJ 345 SC ***(refd)***

Zainur Zakaria v. PP [2001] 3 CLJ 673 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 6A(6), 15

Courts of Judicature Act 1964, ss. 69, 78, 94(2)

Federal Constitution, arts. 121(1), 128(3)

Rules of the Court of Appeal 1995, r. 102

Rules of the Federal Court 1995, r. 137

Rules of the High Court 1980, O. 81, O. 92 r. 4

Rules of the Supreme Court 1980, r. 163

For the appellant - Maniam Raju (Asmawi Ismail & Indran Guru with him); M/s Ng, Fan & Assoc

For the respondent - Wong Kim Fatt (Tho Kam Chew & Tng Poh Ying with him); M/s Gulam & Wong

Reported by Suresh Nathan

JUDGMENT

Abdul Hamid Mohamad FCJ:

By a notice of motion dated 17 December 2004, the applicant, *inter alia*, prayed for the following orders:

1. That leave be granted that Civil Appeal No. 02-03-2004 (J) be re-heard;
2. That the judgment of this court delivered on 22 October 2004 be set aside.
3. That the execution of the said judgment be stayed pending the final disposal of this court in respect of this motion.

To give a brief history of the case, the respondent commenced proceedings in the High Court, Johor Bahru praying for specific performance of an agreement dated 16 December 1995 and, alternatively, for a declaration that the respondent and/or his nominee is the registered and beneficial owner of 32,630 shares in Son Huut Plantation Sdn. Bhd. ("SHP") and that the company secretary registers the respondent and/or his nominee as the legal and beneficial owner of the said shares.

The respondent then applied for a summary judgment pursuant to O. 81 of the Rules of the High Court 1980 ("RHC 1980").

The High Court made an order declaring that the respondent or his nominee was the beneficial owner of the said shares but dismissed the prayer that the company secretary registers the shares in the name of the respondent or his nominee on the ground that the secretary was not made a party.

The applicant then appealed to the Court of Appeal. The respondent also cross-appealed against the refusal of the High Court to direct the company secretary to register the said shares in the name of the respondent or his nominee. On 3 April 2002, the Court of Appeal dismissed both the applicant's appeal and the respondent's cross appeal.

On 3 March 2004, this court granted the applicant leave to appeal to this court on the following question:

> whether the beneficial interest (but not the legal interest) in the shares of a private limited company can pass from a Vendor to the Purchaser upon the disposal of the said shares in non-compliance with the restriction on transfer of share provisions contained in the article of association of the said private limited company i.e. the shares must be offered to the existing members of the company before it may be transferred to a non-member of the company.

On 17 March 2004, the respondent filed a notice of cross-appeal.

The appeal was heard by this court on 15 July 2004. On 22 October 2004, this court delivered its judgment wherein the applicant's appeal was dismissed with costs and the respondent's cross-appeal was allowed with costs. This court thus declared that the respondent was both the beneficial and legal owner of the said shares and further ordered the company secretary to register the respondent or his nominee as the "beneficial and registrable owner" of the shares. The judgment of this court was reported in [2004] 4 CLJ 533.

It is that judgment of this court that the applicant is asking this court to set aside and that the appeal be re-heard.

Learned counsel for the applicant listed a number of "errors in law and or errors in law and fact" in the judgment of this court dated 22 October 2004 as grounds to support this application. They are, in brief:

(1) This court failed to consider that the agreement in question was a bilateral contract and therefore could not involve third parties including the other shareholders of SHP.

(2) This court failed to consider that the share certificates in question were deposited with the respondent as a collateral or pledge to secure the repayment of RM270,000 paid by the respondent to the applicant for the purchase of 8,039 shares in Chan Tiong Kwai Realty Sdn. Bhd. ("CTK").

(3) The court erred in law in relying on s. 6A(6) of the Companies Act 1965 without considering properly whether the said section was applicable to a private limited company.

(4) This court failed to consider that s. 15 of the Companies Act 1965 was applicable to the case and not s. 6A(6).

(5) This court only took into consideration the case of *Hawks v. Mc Arthur & Ors.* [1951] 1 All ER 22 (High Court, Chancery Division) but failed to consider *Hunter v. Hunter* [1936] AC 222 (HL), *Sing Eng (Pte) Ltd. v. PIC Property Ltd* [1990] 3 MLJ 129 (CA Singapore) and *Gan Sin Tuan v. Chew Kian Kor* [1958] 24 MLJ 62 (CA, Malaya).

(6) This court made a wrong finding of fact that the applicant had offered the said shares to the other shareholders.

(7) This court made a wrong finding of fact that the applicant had obtained the consent of the board of directors to transfer the said shares to the respondent.

(8) This court had committed a breach of natural justice in that the court had ordered the registration of the shares in the name of the respondent or his nominee without hearing the other shareholders of the company who were not parties to the proceedings. This has resulted in serious injustice to them.

(9) The judgment has wide ranging repercussions and "may not be consistent with other apex court authorities which were decided in our country or in the Commonwealth ..."

From the grounds listed by the applicant, it can be seen that the applicant is questioning the correctness of the judgment in law and on facts. In other words, the applicant is questioning the judgment on merits. Questioned by the court at the beginning of his submission learned counsel for the applicant admitted that he was not challenging the validity of the constitution of the court that heard the appeal. In fact, he admitted that he was challenging the correctness of the judgment on merits. In fact, whether he admits it or not, that is our view.

Regarding the law under which he made this application, learned counsel said that he was making this application pursuant to r. 137 of the Rules of the Federal Court 1995 ("RFC 1995").

Regarding the law, it must be noted that neither the Federal Constitution nor the Courts of Judicature Act 1964 ("CJA 1964") provides that this court has jurisdiction to set aside its earlier decision or judgment and to direct that the case (or appeal) be re-heard, re-considered and re-decided. The provision that is usually relied on, as in this case, is r. 137 of the RFC 1995 which provides:

137 Inherent powers of the Court

> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

Of late, this rule has received a lot of attention and a lot of importance has been attributed to it. See, for example, *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61 FC, *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd.* [2002] 1 CLJ 645 FC, *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577, *Dato' Seri Anwar bin Ibrahim v. Public Prosecutor* [2004] 4 CLJ 157 FC, *Allied Capital Sdn. Bhd. v. Mohd. Latiff bin Shah Mohd. & Another Applicant* [2004] 4 CLJ 350 FC and *Adorna Properties Sdn. Bhd. v. Kobchai Sosothikul* [2005] 1 CLJ 565 FC.

Our first comment is that we should always bear in mind that that rule is a general rule to be found at the end of the RFC 1995 which contains rules of procedure for use in the Federal Court. RFC 1995 provides for rules of procedure to be followed in and by the Federal Court, including what kind of applications may be made, how and when; how an appeal is to be lodged, prepared for the hearing, heard and how the judgment is to be pronounced and so on. These are all matters of procedure. Then, as in the case of the RHC 1980, O. 92 r. 4, a general provision is inserted to declare that nothing in the RFC 1995 "shall be deemed to limit or effect the inherent powers of the Court to hear any application or to make any order …" In other words, it clarifies that whatever inherent powers the court has is preserved.

So, in our view, it is not quite right to say that r. 137 "confers" or "gives" inherent powers to the Federal Court as has been said in a number of cases eg, *Megat Najmuddin (supra), Chia Yan Teck (supra), Allied Capital Sdn. Bhd. (supra), MGG Pillai (supra) and Adorna Properties Sdn. Bhd. (supra).* In any event, r. 137 not only assumes but confirms that the Federal Court has such inherent powers, otherwise there is nothing to preserve.

In fact, a similar view has been expressed by Edgar Joseph Jr. FCJ in *R. Rama Chandran v. The Industrial Court of Malaysia* [1997] 1 CLJ 147:

> In my view, O. 92 r. 4 is a unique rule of court for while it neither defines nor gives jurisdiction, yet it serves as a reminder and confirmation – lest we forget – of the common law powers of the court, which are residuary or reserve powers and a separate and distinct source of jurisdiction from the statutory powers of the court.

> In other words, even without O. 92 r. 4, the inherent powers of High Court would still be there. In the United Kingdom, for instance, there is no provision in the Supreme Court Rules, equivalent to our O. 92 r. 4, yet the inherent powers occupy a position of great importance in the High Court there as the article by Sir Jack Jacob amply demonstrates. And, the Court of Appeal there also exercises an inherent jurisdiction (see *Aviagents v. Balstravest Investment Ltd.* [1966] 1 WLR 150) notwithstanding the absence of any provision in any written law or rule of court providing for inherent powers.
>
> Similarly, I have no doubt that in this country, the Court of Appeal and the Federal Court also exercise inherent jurisdiction.

Two points should be noted here. First, the learned judge was talking about the inherent powers of the High Court even without the provision of O. 92 r. 4 of the RHC 1980, in spite of the provision of art. 121(1) of the Federal Constitution. We shall elaborate on this later.

Secondly, the learned judge said that he had no doubt "that in this country, the Court of Appeal and the Federal Court also exercise inherent jurisdiction."

In *Megat Najmuddin (supra)* Steve Shim CJ (Sabah and Sarawak) was of the view that the "the Federal Court also has the inherent jurisdiction under the common law to deal with cases with a view to preventing injustice in limited circumstances."

There are numerous judgments of the courts in the country on inherent jurisdictions of the courts, especially of the High Courts, whether decided prior to or after art. 121(1) was amended by Act A 740 that came into force from 10 June 1988 in which the words "there shall be" were substituted for the words "Subject to cl. (2) the judicial power of the Federation shall be vested in cl. (1)." Confining to the judgments of this court and the Supreme Court, the following are some of them: *Phileoallied Bank (Malaysia) Bhd. v. Bhupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 612 (FC), *Zainur Zakaria v. PP* [2001] 3 CLJ 673 (FC), *Kesultanan Pahang v. Sathask Realty Sdn. Bhd.* [1998] 2 CLJ 559 (FC) *Badiaddin Mohd. Mahidin & Anor v. Arab-Malaysian Finance Bhd.* [1998] 2 CLJ 75 (FC), *Scotch Leasing Sdn. Bhd. v. Chee Pok Choy & Ors* [1997] 2 CLJ 58 (FC), *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241, *Muniandy a/l Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 2 CLJ 586 (FC), *Government of Malaysia v. Jasanusa Sdn. Bhd* [1995] 2 CLJ 701 (SC), *Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd.* [1995] 3 CLJ 783 (SC), *United Malayan Banking Corporation Bhd. v. Palm and Vegetable Oils (M) Sdn.*

Bhd. & 3 Ors. [1994] 3 CLJ 144 (SC), *Puah Bee Hong @ Bee Hong (F) & Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Robert Teo Keng Tuan, Intervener) & Another Case* [1994] 2 CLJ 705 (SC), *Raja Zainal Abidin bin Raja Haji Tachik & 3 Ors.* [1993] 3 CLJ 606 SC, *Wong Sin Chong & Anor. v. Bhagwan Singh & Anor.* [1993] 4 CLJ 345 (SC)

We shall only discuss three of the above-mentioned cases.

In *Tuan Haji Ahmed Abdul Rahman v. Arab Malaysian Finance Berhad* [1996] 1 CLJ 241 at p. 253 this court, *inter alia*, said:

> We would add that under its inherent jurisdiction to prevent an abuse of its proceedings, the Court has power to set aside a judgment in default, despite the defendant's application being out of time if the particular circumstances of the case require the intervention of the Court.

It is true that this court in that case was referring to the inherent jurisdiction of the High Court to set aside a default judgment of that court. However, it reaffirms that even the High Court has inherent jurisdiction. This, if we may add, is in spite of the provisions of art. 121(1) that clearly says that "… The High Courts … shall have such jurisdiction and powers as may be conferred by or under federal law." In this respect, it should be noted that art. 128(3) that talks about jurisdiction of the Federal Court is differently worded, thus:

> (3) The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law.

First, this provision talks only about "jurisdiction" but not "powers". Secondly, it is only in respect of appeals, ie, which appeals may come from the Court of Appeal and which appeals may come direct from the High Court or the judge thereof, all of which as may be provided by federal law. Unlike art. 121(1), art. 128(3) does not talk about the general jurisdictions and powers of the Federal Court, nor about applications or orders.

In *Muniandy a/l Thamba Kaundan & Anor v. Development & Commercial Banks Berhad & Anor* [1996] 2 CLJ 586 (FC) this court again reaffirmed the High Court's inherent jurisdiction to set aside an order made by it which is a nullity.

In *Badiaddin Mohd. Mahidin & Anor v. Arab Malaysian Finance Bhd.* [1998] 2 CLJ 75 (FC) all the judges in their separate judgments talked about the inherent jurisdiction of the High Court to set aside its own order where it "can be proved to be null and void on the ground of illegality or lack of jurisdiction" per Mohd. Azmi FCJ "even in the absence of an express enabling provision," per Gopal Sri Ram JCA and "to stay any proceeding (which includes an order of execution) which is an abuse of process," per Peh Swee Chin FCJ.

So, if the High Court, in spite of the provision of art. 121(1) of the Federal Constitution still has inherent jurisdiction and powers, what more the Federal Court? It is our view therefore, that this court has the inherent jurisdiction and powers, including the jurisdiction to hear this application and the power to make the necessary orders. This jurisdiction and power is inherent in this court and it is reaffirmed by r. 137 RFC 1995.

The question then is under what circumstances should it be exercised?

In *Lee Thye Sang & Anor v. Faber Merlin (M) Sdn. Berhad & Ors* [1985] 2 CLJ 423; [1985] CLJ (Rep) 196 (SC), the applicants applied by motion for an order that the judgment of the Supreme Court in civil appeals, in which they were respondents, be reviewed. The applicants invoked the provision of s. 69, in particular sub-sections (3) and (4) of the CJA 1964 to support their application that the Supreme Court had such a power.

The Supreme Court dismissed the application. Delivering the judgment of the court, Abdul Hamid CJ (Malaya) (as he then was), *inter alia*, said:

> The question before the Court is, therefor, whether sub-section (4) can be construed to confer an unlimited power on the Supreme Court to review, meaning to re-open, re-examine and reconsider with a view to correction, variation, alteration or reversal, if necessary, an earlier decision in an appeal that has already been heard and disposed of.
>
> Our view is that there is no merit in the contention made by the applicants. Sub-section (4) of the Act cannot be construed to mean that it confers unlimited power upon the Supreme Court to re open, re-hear or re-examine, if necessary, to reverse or set aside a judgment given in an appeal already heard and disposed of by it. So to construe would indeed not only be contrary to the clear meaning to the words used in section 69 but also contrary to Article 128(1) of the Federal Constitution.

Article 128(3) states that "the jurisdiction of the Supreme Court to determine appeals from a High Court or a judge thereof shall be such as may be provided by federal law."

The Courts of Judicature Act 1964 is such a law made pursuant to cl. (3) of art. 128.

With respect to appeals, s. 41 of the Act provides that appeals shall be decided in accordance with the opinion of the majority of judges composing the court. Read in the light of s. 67(1), the jurisdiction of the Supreme Court in regard to civil appeals shall specifically be to hear an appeal from any judgment or order of any High Court. There is certainly no provision which confers jurisdiction on a Supreme Court to hear and determine appeals from a decision given in an appeal it has already heard and disposed of.

Where, therefore, a final decision has been delivered, an appeal is in effect heard and disposed of. In other words, it is brought to a final conclusion. And that being the case, the Supreme Court has no power to re-open, re-hear and re-examine its decision for whatever purpose. The only exception where there can be a re-hearing is only to the extent provided by section 42, in particular sub-section (3) of section 42. The other exception is as provided under section 44 sub-section (3) to the effect that every order such as that envisaged in sub-section (1) of section 44 may be discharged or varied by the full Court.

It is important to note that the court went so far as to invoke the provision of art. 128(3) of the Federal Constitution which was substantially the same as it is now except for the modification arising from the creation of the Court of Appeal in rejecting the argument that s. 69(4) conferred such power to the court. Again, except for the cosmetic changes made to s. 69 as a result of the creation of the Court of Appeal, the substantive provision of s. 69 remains the same.

It is also to be noted that at that time there was no provision in the Rules of the Supreme Court 1980 equivalent to r. 137 RFC 1995. Instead, there was r. 163 ("Effect of Non-Compliance") which was exactly the same as r. 102 of the Rules of the Court of Appeal 1995 ("RCA 1995"). In fact, with the creation of the Court of Appeal, r. 163 was transferred to the RCA 1995 as r. 102.

In any event, that case shows the attitude of the court towards an application to review a decision of the court in the same appeal.

Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [2001] 4 CLJ 61 is a judgment of this court. The judgment in that case was delivered on 10 August 2001. In that case, the judgment of this court allowing the appeal from the Court of Appeal was pronounced by the deputy registrar on 22 December 2000. But, as on that day, out of the three judges who heard the appeal, two of them had retired, leaving only one. This court held that as the effective date of the judgment was the date of its pronouncement in open court ie, 22 December 2000 and as on that day only one out of the three judges who heard the appeal was still in service (the other two having retired earlier), the court was not properly constituted. So, the application to set aside the order of 22 December 2000 was allowed.

Mohd. Dzaiddin CJ, in his judgment which was agreed to by the other two judges used the term "as may be necessary to prevent injustice."

The next case is *MGG Pillai v. Tan Sri Vincent Tan Chee Yioun* [2002] 3 CLJ 577. The judgment was delivered on 16 May 2002. In that case, this court heard the appeal on 12 and 13 January 1998 and judgment was reserved. On 12 July 2000, the judgment of the court by Eusoff Chin, the then Chief Justice and also the presiding judge, was read out by the senior assistant registrar. At the time of the delivery of the judgment, Chong Siew Fai CJ (Sabah & Sarawak) had retired from the bench. He retired on 2 July 2000. Both he and Wan Adnan, the then Chief Judge (Malaya), the other member of the panel, had intimated their approval to the written judgment of the Chief Justice. The applicant applied by way of motion to set aside the judgment on the grounds that: (i) the judgment was invalid as it was delivered by an improperly constituted court; and (ii) the judgment was tainted by apparent bias on the part of the presiding judge. The respondent responded by filing a motion to strike out the applicant's motion on the ground of irregularities.

This court, by a majority, allowed the applicant's application and dismissed the respondent's application. In other words, the judgment of this court pronounced on 12 July 2000 was set aside. Both Siti Norma Yaakob FCJ and Haidar Mohd. Noor FCJ (as they then were) held that the effective date of the judgment was the date of its pronouncement in open court. The court followed *Chia Yan Tek (supra)*, and held that since there were only two judges remaining on that day, and as no consent was given by the parties to the proceedings pursuant to the requirement of the pre-amended s. 78 of the Courts of Judicature Act 1964 ("CJA 1964") which was the law applicable in that case, for the proceedings to be continued by the remaining two judges, the judgment "was ineffective and invalid as the court was not properly constituted," per Siti Norma Yaakob FCJ of the law report.

Steve Shim (CJ Sabah and Sarawak), in his judgment, was more elaborate. He said:

> ... I hold the view that the Federal Court does have the inherent jurisdiction and power which can be invoked in limited circumstances to reopen, rehear and reexamine its previous judgment, decision or order which has been obtained by fraud or supression of material evidence so as to prevent injustice or an abuse of the process of the court.

Siti Norma Yaakob FCJ talked about "whether an injustice has been done … or whether an abuse of the process of the court has been committed." The learned judge concluded, on the facts:

> Since the applicant's accrued interest has been violated in this case leading to a miscarriage of justice, it follows that he is entitled to have his appeal reheard before another panel of this court.

Haidar FCJ also talked about "injustice" and held that the judgment was invalid.

In *Dato' Seri Anwar bin Ibrahim v. Public Prosecutor* [2004] 4 CLJ 157 (FC) four motions were filed. In the first motion, the applicant asked this court to invoke its inherent powers under r. 137 of the RFC 1995 to set aside convictions and sentences of the applicant that were confirmed by this court earlier when the appeal from the court of appeal was heard. The second motion was for the court to allow fresh/additional evidence affecting the trial to be adduced. The third motion was for leave for applicant to be allowed to rely on five additional grounds. The fourth motion was for leave for the applicant to rely on another additional ground on the ground that s. 94(2) of the CJA 1964 was unconstitutional and void.

At the commencement of the hearing of the motion, the respondent raised a preliminary objection on the first motion that the court did not have the necessary jurisdiction to re-litigate on such appeals.

The court overruled the preliminary objections, holding that it had jurisdiction to hear the motions, proceeded to hear the motion and dismissed them.

The point to be noted is that the ruling regarding jurisdiction was in respect of hearing the motions. The motions were dismissed after hearing them. It is not a case where the court having granted leave to re-hear the appeal, set aside the conviction and sentence, re-heard the appeal and then re-confirmed the conviction and sentence.

Abdul Malek Ahmad PCA who wrote the judgment on the preliminary objection stuck to the words of rule 137 ie, "to prevent injustice or to prevent an abuse of the process of the court."

In *Allied Capital Sdn. Bhd. v. Mohd. Latiff bin Shah Mohd. & Another Application* [2004] 4 CLJ 350, the applicants whose appeal to the Court of Appeal was dismissed after it was heard, applied to the Federal Court for leave to appeal to the Federal Court. The leave application was heard and dismissed by the Federal Court. Subsequently the applicants filed two separate notices of motion, *inter alia*, praying that the order of the Federal Court dismissing the leave application be set aside and that they be given leave to appeal to the Federal Court against the order of the Court of Appeal. The respondents then applied to strike out the applicants' motions on a number of grounds, including that the Federal Court had no jurisdiction or power to set aside its order refusing leave to appeal or to re-hear the application.

The court, by a majority, held that the Federal Court had jurisdiction to hear the applications and that the "application proper" should be fixed for hearing accordingly. On the test to be applied, the majority judgment also reiterated the words used in r. 137. The minority judgment reached a different conclusion because it considered the merits of the application.

The most recent decision of this court on the issue is *Adorna Properties Sdn. Bhd. v. Kobchai Sosothikul* [2005] 1 CLJ 565 (FC). That was also an application pursuant to r. 137 RFC 1995 to set aside an order of the Federal Court made on 22 December 2000, after hearing the appeal and for the appeal be re-heard by the court. The ground advanced was "interest of justice". Prior to this application, there was an earlier application ("the first application") by the same applicant on the ground that one of the judges had retired before the judgment was delivered. The first application was dismissed. This court dismissed the application (the second application).

P.S. Gill FCJ, delivering the judgment of the court, *inter alia*, gave the following reasons:

> Firstly, although the consequence and effect of the main judgment may be harsh when viewed without the benefit of the relevant statutory provision, we do not think this is a case where 'grave injustice had occasioned' due to clear infringement of any principle of law thereby making it permissible for successive application to be made under the said rule. Without going into the merits of this application we find that the substance of the main judgment revolves in the interpretation of s. 340 subsection (3) including the proviso thereof of the National Land Code. …

And having read the reasoning therein and bearing in mind the words used in the said subsection including the proviso we are not convinced that the interpretation given in the main judgment is patently wrong thereby resulting in grave injustice thus warranting successive application under r. 137. And even if we are wrong our view it should be left to another occasion to further debate on the issue. For now we are of the opinion that despite the concession made by learned counsel for the respondent on the issue of successive application this is not a proper case for us to proceed to hear the merits or to grant the order as sought for.

Secondly, there is much force to be given to the contention that there should be finality to any litigation. The main judgment was handed down by this Court which is the apex court of this country. If the application of r. 137 is made liberally the likely consequence would be chaos to our system of judicial hierarchy. There would then be nothing to prevent any aggrieved litigant from challenging any decision of this court on the ground of 'injustice' *vide* r. 137. And if he succeeds in his application there is also nothing to bar the other party from making his own application to overturn such success. In short, there will be no end to the matter. We do not think that was the intention of the legislature when promulgating the said rule.

Thirdly, this present application is weakened by the fact that there was the first application heard and dismissed by this court. And it was never suggested that the ground advanced in this application was not available then. The only reason given before us was 'human error'. We do not think that is sufficient for us to overlook the implication that to allow this application would tantamount to permitting the applicant to advance his grievances by instalment.

Fourthly, there is also the element of delay on the part of the applicant. The first application was made in 2001 and after its disposal there was a lapse of almost 18 months before the present application was filed on 12 July 2002. Thus not only the grounds were submitted by way of instalment, there was delay as well. We do not think this court should condone, let alone encourage, such an attitude. A court of law is duty-bound to ensure that the interests of all parties appearing before it are equally safeguarded. Public interest expects it. And it would be highly undesirable and prejudicial to a successful litigant to be kept in limbo while the unsuccessful party ponders as to his next course of action.

This present application is therefore dismissed with costs. Preliminary objection sustained.

P.S. Gill FCJ, who delivered the judgment of the court used the term "grave injustice had occasioned" but held that that was not such a case.

This case clearly shows the reluctance of this court to set aside its previous order made after the appeal was fully heard even though the first application that had been dismissed was grounded on "coram failure" as one of the judges had retired prior to the delivery of the judgment in the appeal, a situation which appears to be similar to *Chia Yan Tek (supra).*

From the cases, it is clear that, so far, this court had only given orders that its previous decisions, judgments or orders be set aside and ordered that the appeals be re-heard when such decisions, judgments or orders were a nullity or invalid because the court giving such decisions, judgments or orders was not properly constituted.

We do not say that the circumstances under which this court would set aside its previous decisions, judgments or orders and for the re-hearing of the appeals are closed. Neither do we intend to list down the circumstances that warrant such an order. However, to give two examples, there may be jurisdictional error, for example, where the court inadvertently heard and decided on an appeal which, in law, is patently not appealable to this court, or due to illegality where this court inadvertently imposed a sentence unknown in law or in excess of the maximum sentence permissible by law.

On the other hand, no leave to review should be given where the previous order is challenged on its merits, whether on facts or in law. Merely because the panel hearing the application is of the view that an important piece evidence had not been given sufficient weight or that the current panel disagrees with the interpretation or application of a certain provision of the law is not a sufficient reason for the court to set aside its previous order.

The reasons have been amply stated by this court in *Adorna Properties Sdn. Bhd. (supra)* with which we fully agree. The only other reason we would like to add is that to freely allow previous orders to be reviewed would lead to "panel shopping". An unsuccessful party in an appeal may try its luck before another panel that may disagree with the view of the earlier panel. If he is successful in having the order reversed, the other party will do the same thing again. Certainly, we would not like to see this apex court becoming a circus that repeats the same show again and again.

Coming back to the present application. It has been seen that the applicant questions the findings of this court both in law and on facts. These are matters of opinion. Just because we may disagree (we do not say whether we agree or disagree with such findings) with the earlier panel of this court, that is not a ground that warrants us to review the decision. Similarly, regarding the

interpretation and application of some provisions of the Companies Act 1965, even if we disagree with the earlier panel (again we do not say whether we agree or disagree) that does not warrant us to set aside the judgment and the order of the earlier panel of this court and re-hear and review the appeal. Otherwise, as has been said, there would be no end to a proceeding.

In conclusion, it is our unanimous view that this is not the kind of case that this court should review its previous judgment and order. If and when, in another case, the same issue of law arises, then, after hearing a full argument, this court may reconsider and decide whether it agrees with its earlier view or not. This court had done that on a number of occasions before.

For these reasons, we dismissed the application with costs and ordered that the deposit be paid to the respondent on account of taxed costs.